FILED
JAN 22 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted] 14

COMMONWEALTH COATINGS CORPORATION,

Petitioner,

—v—

CONTINENTAL CASUALTY COMPANY, FIREMAN'S FUND INSURANCE COMPANY AND A. C. SAMFORD OVERSEAS, INC.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

1. Did the Court of Appeals commit reversible error in not holding, as proposed by Petitioner, that under the Federal Arbitration Act an arbitration award must be automatically vacated where there have been previous business relations between an arbitrator and a party, irrespective of any other considerations, such as:

   (a) The business relations were remote, isolated, casual and insubstantial, and occurred more than one year prior to the arbitration proceedings;

   (b) No inquiry was made of the party or the arbitrator about business relations although the objecting party (a subcontractor), whose counsel was a close personal friend of the arbitrator, knew the respective businesses of the arbitrator (performing engineering consulting services for the construction industry) and the party (a general contractor), knew these businesses were closely related (the firm with which the arbitrator was associated having performed engineering consulting services for most of the contractors in the area), knew of the prominent reputation of the arbitrator in his field, and knew of the substantial business engaged in by the party in the area;

   (c) The objecting party admitted that such business relations had no effect on the honesty or integrity of the arbitrator and that the arbitrator did not act improperly in any way, therefore admitting that such business relations had no effect on the arbitration proceedings or the award; and

   (d) The arbitration proceedings were in fact conducted in a fair and impartial manner?

STATEMENT OF THE CASE

One of the Respondents herein, A. C. Samford Overseas, Inc. (sometimes hereinafter referred to as "Samford") was the general contractor for the construction of five large projects in Puerto Rico, more particularly described as follows:

1. Aguadilla Housing Project in Aguadilla, Puerto Rico, under contract dated May 18, 1960, with the Puerto Rico Urban Renewal and Housing Corporation;

2. Dr. I. Gonzalez Martinez Oncologic Hospital under contract dated December 4, 1959, with the Board of Trustees of the Puerto Rican League Against Cancer;

3. The Central Power Plant & Laundry in Rio Piedras, Puerto Rico, under contract dated August 18, 1960, with the Provisional Board of the Puerto Rico Medical Center;

4. The Rehabilitation Center in Rio Piedras, Puerto Rico, under contract dated November 23, 1960, with the Provisional Board of the Puerto Rico Medical Center; and

5. The Wherry Housing Modification and Improvement at Ramey Air Force Base in Puerto Rico under contract dated November 23, 1960, with the United States of America (R.30a-31a, 41a).[1]

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[1]Citations to the Record by page number and suffix "a" are to pages of the Appendix of Appellant (Petitioner) filed with the Court of Appeals for the First Circuit and made a part of the Record before the Supreme Court under Rule 21 (3), Rules of the Supreme Court of the United States.

During 1960 and 1961 Petitioner, Commonwealth Coatings Corporation, and Samford entered into five subcontracts under which Petitioner was to perform the painting work on the five projects. The total of the subcontract prices was $351,938.00 (R.33a).

Petitioner commenced the painting work on the projects; however, disputes arose between the parties concerning performance of contractual obligations, Samford claiming that Petitioner failed to perform timely and correctly all of its duties under its subcontracts (R.31a, 72a). During June and July, 1962, Petitioner abandoned its work on the five projects and, pursuant to default provisions of the subcontracts, Samford terminated the subcontracts and completed the work of Petitioner, backcharging Petitioner for the cost of completion of the painting work (R.31a, 71a-72a).

Following termination of the subcontracts, arbitration proceedings were initiated by the parties pursuant to the arbitration clauses of the subcontracts as a means of resolving the disputes (R.31a, 69a-70a). Samford selected Dwight L. Chapman as its arbitrator (R.32a). Mr. Chapman was a graduate engineer with 30 years of service for the Corps of Engineers as a civilian engineer, acting principally in the capacity of contracting officer on government projects (R.95a-96a).

Petitioner selected as its arbitrator an attorney by the name of Holman (R.136a). Mr. Chapman and Mr. Holman named as the third arbitrator Jose L. Capacete, an eminent professional consulting engineer in Puerto Rico and a professor of engineering at the University of Puerto Rico and part owner and an officer of Foundation Engineering Company of Puerto Rico and the architectural-engineering firm, Capacete, Martin & Gutierrez

(R.66a, 132a, 133a, 136a, 37[2]). Mr. Holman shortly thereafter died, and Petitioner subsequently appointed Hector Martinez Munoz, a San Juan attorney, as its arbitrator (R.136a-137a). As a fellow San Juan attorney Mr. Martinez was a professional colleague and friend of the attorney for Petitioner, Carlos Romero Barcelo (R.66a).

However, before the arbitration hearings were commenced, Petitioner brought Civil Actions Nos. 441-62 and 442-62 in the District Court of Puerto Rico against Respondents, Continental Casualty Company and Fireman's Fund Insurance Company, the construction sureties of Samford on the various projects (R.2a, 12a). Civil Action No. 441-62 was brought separately as a Miller Act suit under 40 U.S.C.A. §270(b). Upon motions by the defendants in said actions, the actions were stayed by the District Court on March 12, 1963, pending the outcome of the arbitration proceedings (R.3a, 13a).[3]

Upon the issuance of the District Court of Puerto Rico of a stay of these actions, the arbitration commenced on August 14, 1963 (R.3a, 13a, 63a). At the opening of the arbitration proceedings, the parties mutually agreed that all questions of fact and law regarding the disputes between the parties would be submitted to the arbitrators for decision (R.32a-33a). After approximately ten days of hearings and an estimated 90 hours of testimony

[2]Citations to the Record by page number without suffix are to pages of the Appendix of Appellees, found beginning at page 36 of Brief of Appellees to the Court of Appeals for the First Circuit, and made a part of the Record before the Supreme Court under Rule 21 (3), Rules of the Supreme Court of the United States.

[3]Decision reported, *U.S. for Use and Benefit of Commonwealth Coatings Corp. v. Continental Cas. Co.* 214 F.Supp. 949 (D.C.P.R. 1963).

(R.83a), the hearings were concluded on September 3, 1963 (R.63a), and on November 12, 1963, the arbitrators issued their unanimous, formal, written award (R.30a-35a). The award determined that Petitioner had abandoned its work on the five projects without contractual right and, pursuant to the authority granted by the subcontracts, Samford properly terminated Petitioner as a subcontractor and completed its work (R.34a). Samford had claimed costs of completion of Petitioner's work in the amount of $244,025.00 (R.72a). Of the amount claimed, the arbitrators determined that the reasonable cost to Samford for completing this work was $158,307.86 (R.34a). By applying this backcharge against the total unpaid subcontract balance of $142,435.51 as provided in the default provisions of the subcontracts, the Board determined that Petitioner was indebted to Samford in the amount of $15,872.35, discharging Samford from any and all liability to Petitioner (R.34a).

On January 24, 1964, defendants in Actions Nos. 441-62 and 442-62 filed motions to dismiss the complaints in said actions on the basis of the issuance of the arbitration award in favor of their principal obligor, Samford (R.4a, 14a).

On February 7, 1964, Petitioner filed Civil Action No. 65-64 in the District Court of Puerto Rico against A. C. Samford Overseas, Inc. to vacate the arbitration award (R.21a, 36a-53a). Defensive pleadings were filed by Samford, praying for confirmation of the award and entry of judgment for Samford.

A hearing of the motions pending in Civil Actions Nos. 441-62, 442-62 and 65-64 was had in the United States District Court for Puerto Rico on July 16, 1965 (R.5a, 6a, 16a). On January 4, 1966, the District Court

formally consolidated Civil Actions Nos. 441-62, 442-62 and 65-64 for trial and all proceedings thereafter (R.74a-76a).

The three cases were called for trial on February 14, 1966, and testimony and argument of counsel were presented by Petitioner and Respondents (R.17a-18a, 77a-174a). On September 30, 1966, the District Court issued its memorandum decision and judgment confirming the award, determining that the hearings were fair and impartial, and ordering that Samford recover the amount of the award, $15,872.35, from Petitioner, with costs (R.175a-178a).

Petitioner appealed the decision of the District Court to the Court of Appeals for the First Circuit on the sole ground that there was "evident partiality" on the part of one arbitrator, Mr. Jose L. Capacete. Brief of the Appellant (Petitioner) to the Court of Appeals, p. 3-4. On September 11, 1967, oral argument was had, and on September 27, 1967, the Court of Appeals issued its per curiam decision affirming the judgment of the District Court of Puerto Rico. Pet. for Cert., Appendix "A," p. 17-19.[4]

On December 21, 1967, the Petition for Certiorari to the Court of Appeals for the First Circuit was docketed in the Supreme Court of the United States.

Petitioner's argument to the Court of Appeals and in the Petition for Certiorari is basically that there was automatically "evident partiality" under the Federal Arbitration Act, 9 U.S.C.A. §10(b), on the part of Mr. Capacete for the reason that information that engineering consulting services had been performed in the past by a

[4]Decision reported at 382 F.2d 1010.

firm with which Mr. Capacete was associated, Foundation Engineering Company of Puerto Rico, for Samford had not been volunteered to Petitioner, although such information was not solicited by Petitioner and regardless of other considerations such as the fact such transactions were insignificant and remote and the fact that Petitioner had indeed received a fair and impartial hearing.

Mr. Capacete testified that he owned 67% of Foundation Engineering Company of Puerto Rico (R.132a). Prior to the dispute between the parties and the arbitration proceedings, Foundation Engineering Company had performed engineering consulting services on isolated occasions for Samford (R.130a). Foundation Engineering Company prior to 1957 was the only engineering consulting firm in Puerto Rico performing such consulting services. Between 1957 and 1959 there were only two such companies in Puerto Rico and up to 1959 and 1960 Foundation Engineering Company was the larger of the two companies. After 1959, there were three firms performing such engineering consulting services in Puerto Rico, one other of which performed approximately the same amount of business as Foundation Engineering Company (R.132a-133a). As an engineering consultant Mr. Capacete further testified, "I would say I have business relations with most of the contractors in Puerto Rico" (R.133a).

The consulting services performed by Foundation Engineering Company for Samford were furnished between approximately 1957 and 1961 "or perhaps 1962" (R.130a). During the years involved the total annual volume of business of Foundation Engineering Company was in the order of $200,000 per year (R.132a). The total amount of business of Foundation Engineering Com-

pany with Samford over the four or five year period such consulting services were furnished was only a small portion of the business of Foundation Engineering Company, totalling for all four or five years only about $12,000 (R.130a). Of this, only a minor amount involved the five projects where Petitioner was a subcontractor, and *none of these services pertained in any way to Petitioner or the painting work* (R.130a). Mr. Capacete testified that some testing work was performed on two or three of these projects for charges totalling "in the order of three or four thousand dollars, maybe two or three thousand dollars" (R.131a). This testing work was performed over a period of approximately two years (R.131a). The type of services furnished by Foundation Engineering Company consisted of testing of concrete and other material and drilling for foundation investigations (R.59a, 127a). The fees paid Foundation Engineering Company were the normal and customary fees for such services (R.65a). Of the services performed for Samford by Foundation Engineering Company, only approximately 10% required Mr. Capacete's personal attention (132a). Foundation Engineering Company was only a part of Mr. Capacete's business interests, as he was also a part owner and officer in Capacete, Martin & Gutierrez, an architectural-engineering firm (R.133a).

The relationship between Mr. Capacete and Petitioner, through its counsel, Mr. Romero, was in fact much closer than any relationship with Samford. Mr. Capacete testified that he had met A. C. Samford, Jr. personally only "about 4 or 5 times" (R.126a). On the other hand, Mr. Capacete testified that at the time of the arbitration hearings he knew Mr. Romero "very well";

that he was "a very old friend of his father," who was one of the "highest esteemed engineers in this island"; and that Mr. Romero and he were fellow members of the Rotary Club (R.137a). He summarized his relationship with Mr. Romero as, "I know him well, I would say, as a good friend of mine" (R.137a).

Furthermore, Mr. Romero knew that Mr. Capacete was engaged in a business which would very likely have performed services for Samford. Mr. Capacete testified that Mr. Romero knew of his position in the field of engineering and his business activities, and that, "he was acquainted that he knew my type of business, that I was a consulting engineer in foundations and in testing" (R.137a).

Although this close relationship existed between Mr. Romero and Mr. Capacete, Petitioner argues that, "None of the arbitrators informed him [Mr. Romero] that any of them had any prior business or financial relations" with Samford. Pet. for Cert., p. 7. Mr. Capacete testified Mr. Romero *never asked him* whether he had performed work for or had had commercial relations with any of the parties to the arbitration (R.137a). Furthermore, no contention is advanced by Petitioner that any inquiry was ever made prior to conducting the arbitration proceedings of any of the Respondents or their counsel concerning previous business relations between any of the Respondents and any of the arbitrators.

Petitioner argues that Mr. Capacete and Respondents "concealed" the previous business relation between Foundation Engineering Company and Samford. Pet. for Cert., p. 2,8. "Concealment" implies a positive effort to avoid disclosure, but nowhere is there any evidence to

substantiate or give any credence to this allegation of fact by Petitioner.

Petitioner further argues that when Petitioner was to select a new arbitrator upon the death of its first arbitrator, Mr. Holman, "Counsel for the surety companies imposed as a condition for Commonwealth's designation of an arbitrator to replace a deceased arbitrator, that the prospective arbitrator should have had no business prior relationship with the parties." Pet. for Cert., p. 8. Here also there is no evidence to support the allegation of Petitioner. The citation of Petitioner to page 72a of the Record is merely to the *argument* of counsel for Petitioner. The citation to pages 82a-83a of the Record is to the reply to this argument by counsel for Samford in the arbitration proceedings, which reply entirely clarified the matter. Samford had merely reserved "the right to object [to a prospective arbitrator] because they have *an interest in the litigation or are involved in it*" (R.83a; emphasis added). No mention whatsoever was made of a categorical condition as to previous business relationships; Samford only desired to reserve its right to object if the new arbitrator were found to have an interest in the controversy itself.

REPLY OF RESPONDENTS TO PETITIONER'S ARGUMENT FOR THE GRANTING OF CERTIORARI

Petitioner, Commonwealth Coatings, is attempting to obtain a writ of certiorari on two grounds, namely: (1) that the Court of Appeals for the First Circuit has decided an important question of federal law which has not been, but should be, settled by this Court, and (2) that the Court of Appeals has rendered a decision in con-

flict with the decision of another Court of Appeals on the same matter.

It is respectfully submitted by Respondents that there is no important question of federal law involved in the case at bar which requires resolution by the Supreme Court, and, to some extent reflecting the absence of an important federal question, there is no conflict between the decisions of the Courts of Appeals on the matter involved.

I. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT

The question which Petitioner submits should be resolved by this Court is whether or not under the Federal Arbitration Act there shall be an automatic vacatur of an arbitration award where a party or an arbitrator prior to the commencement of arbitration proceedings, has not volunteered unsolicited information about business relationships that may have existed between them, regardless of how remote and insignificant, and notwithstanding whether or not there was any effect on the hearings or the award. Pet. for Cert., p. 14.

Nowhere in either the case authority or legal commentaries has there been found any indication that this is a question under the Federal Arbitration Act which requires resolution by the Supreme Court. To the contrary, the general rule is well settled concerning the test of what factors will warrant the vacatur of an award, which rule has been consistently applied by the federal courts, including the District Court and the Court of Appeals in the case at bar. American Jurisprudence 2d states the rule:

"Though the courts look with favor on arbitration proceedings and make every presumption in favor of the validity of awards, this is done on the assumption that these awards constitute the *honest judgment* of the arbitrators, rendered after a *fair hearing*. Consequently, when there is *positive evidence of fraud or collusion* on the part of the arbitrators, they lose all claim to the favor of the courts and, under equitable principles, the awards will will (sic) be set aside. Where there has been fraud, the arbitrators have not really acted within the lines of the duty laid upon them; they have not in fact carried out the agreement under which they obtained authority to act. *Corrupt motives, however, are not lightly to be ascribed to the arbitrators.*" 5 Am.Jur.2d 647. (Emphasis added.)

"An interest or bias to disqualify may be small, but *it must be direct, definite, and capable of demonstration, not remote, uncertain, or speculative.* A person may be disqualified if he is a close relative, servant, employee, or agent of one of the parties, or has any secret interest in the result or decision of the dispute. *And where the relationship is not sufficient per se to warrant equitable interference, it will be considered in the light of all the other circumstances of the case, such as the conduct of the arbitrators, or the size of the award. If, when taken as a whole, partiality is evident, the award will be set aside. But courts will not interfere under their equity powers where the relationship of the parties is casual or such as not to give rise to an inference of unfairness.*" *Id.* at 653. (Emphasis added.)

To summarize this rule in light of the position taken

by Petitioner, it is clear that something more than the mere existence of a past business relationship between an arbitrator and a party to arbitration proceedings, not known to the other party in the proceedings, is required before an award will be vacated. In other words, when an award is challenged on the ground of partiality of an arbitrator, a court weighs the evidence presented to determine if it supports the conclusion of either certain or probable partiality, bias or fraud as a matter bearing directly upon whether the objecting party received a fair hearing; the court seeks to determine whether there was *actual* partiality, bias or fraud, not merely whether some mere circumstance, such as previous business relationship, exists which may or may not indicate anything about the fairness of an arbitration hearing, depending on the particular facts of each case. *Saxis Steamship Co. v. Multifacs International Traders, Inc.*, 375 F.2d 577 (2nd Cir. 1967); *Ilios Shipping and Trading Corp v. American Anthracite & Bituminous Coal Corp.*, 148 F.Supp. 698, (D.C.N.Y. 1957), aff'd 245 F.2d 873 (2nd Cir. 1957); *Kentucky River Mills v. Jackson*, 206 F.2d 111, 47 ALR2d 1331 (6th Cir. 1953), cert. den. 346 U.S. 887, 74 S.Ct. 144, 98 L.ed. 392 (1953); *Fireman's Fund Ins. Co. v. Flint Hosiery Mills*, 74 F.2d 533, 104 ALR 556 (4th Cir. 1935), cert. den. 295 U.S. 748, 55 S.Ct. 826, 79 L.ed. 1692 (1935); *The Hartbridge*, 62 F.2d 72 (2nd Cir. 1932), cert. den. 288 U.S. 601, 53 S.Ct. 320, 77 L.ed. 977 (1933); *Stef Shipping Corporation v. Norris Grain Co.*, 209 F.Supp. 249 (D.C.S.D.N.Y. 1962); *Texas Eastern Transmission Corporation v. Barnard*, 177 F.Supp. 123 (D.C.Ky. 1959), rev'd on other grounds, 285 F.2d 536 (6th Cir. 1960); *Cross Properties, Inc. v. Gimbel Brothers, Inc.*, 225 N.Y.S.2d 1014 (App. Div. 1962), aff'd 12 N.Y.2d 806 (Ct. App.), *E. Richard*

Meinig v. Katakura and Co., 272 N.Y.S. 735 (App. Div. 1934), 266 N.Y. 418, 195 N.E. 134.

The Second Circuit had occasion recently in *Saxis Steamship Co., supra,* to review the procedure followed by the courts when evaluating objections to an award under the Federal Arbitration Act, with particular attention to the objection of "evident partiality,"

> "'. . . the role of the courts is limited to ascertaining whether there exists one of the specific grounds for the vacation of an award, provided in §10 of the Arbitration Act, ... *It is true that when a claim of partiality is made, the court is under an obligation to scan the record to see if it demonstrates 'evident partiality' on the part of the arbitrators.* [Authority cited.] *The burden of proof on this issue in the confirmation proceedings in the district court rests upon the party making the claim." Id.* at 581-582.

The Court of Appeals below indicated it followed the general rule where the court stated, reflecting a review of the relationship between Mr. Capacete and Samford,

> ". . . we cannot say that the relationship was sufficiently close to establish 'evident partiality' within the statute as a matter of law. [Authority cited.]" Pet. for Cert. Appendix "A," p. 19.

The Court of Appeals evaluated the evidence as to the relationship between Foundation Engineering Company and Samford and determined that the relationship was not sufficiently close to establish "evident partiality" on the part of Mr. Capacete.

Petitioner has generally conceded that there was no *actual* bias, partiality or fraud on the part of Mr. Capa-

cete or that the award was affected adversely because of the previous business relations between Foundation Engineering Company and Samford: Petitioner has on numerous occasions admitted that it does not challenge the honesty or integrity of Mr. Capacete or allege that Mr. Capacete acted improperly in any way.[5]

At the hearing before the District Court on July 16, 1965, on the motions of Petitioner to set aside the arbitration award, Mr. Romero, attorney for Petitioner, stated,

> "Now, we don't mean to say that we believe that the Chairman [Mr. Capacete] acted improperly in any way. . . " (R.37).

The District Court summarized the position of Petitioner by stating,

> "I know Mr. Capacete pretty well and I know his caliber as an engineer and as a man of science, there is no doubt. And I believe that nobody here is trying to raise any reflection whatsoever on the ability, honesty and integrity of Mr. Capacete. . . " (R.37),

to which Mr. Romero for Petitioner responded,

> "That's our position and we have so stated numerous times" (R.37).

At the second hearing before the District Court on February 14, 1966, on the motions of Petitioner to set aside the award, Mr. Romero for Petitioner admitted that Petitioner was making no challenge of the integrity of Mr. Capacete and, in fact, the court was assured of Mr. Capacete's honor,

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[5]When confronted with these admissions, Petitioner has, however, vacillated in its position. Reply Brief of Appellant (Petitioner) to the Court of Appeals, p. 3.

"We want to make it known that we are in no way attacking the arbitrator's integrity. We believe him to be an honorable man," (R.79a),

to which the District Court responded,

"I believe you have said that all the time that you have come in here" (R.79a).

On the basis of these admissions and upon consideration of all the evidence presented at the hearings and the arguments of the parties, the District Court specifically held,

"With respect to No. 3, alleged partiality, bias or fraud of one of the arbitrators, *counsel for plaintiff disclaimed any imputation of bias, partiality, or fraud on the part of the arbitrator involved.* He seeks to overthrow the award on the ground that Samford should have informed plaintiff that the engineering firm with which the arbitrator involved was connected had in the past done work for Samford. In view of the fact that, not only has plaintiff failed to offer any evidence showing 'evident partiality' in said arbitrator [9 U.S.C. §10 (b)], *it also has expressly disclaimed any such imputation,* this objection to the award must be, and is hereby overruled. [Authorities cited]" (R.176a). Pet. for Cert., Appendix "B," p. 21. (Emphasis added.)

Both the trial court and the Court of Appeals reviewed the arbitration proceedings and determined that the evidence showed the proceedings were in fact fairly and impartially conducted. The District Court held,

"In closing, *I wish to state that the record shows that the arbitrators conducted fair, impartial hearings;*

that they reached a proper determination of the issues before them . . . " (R.176a-177a). Pet. for Cert., Appendix "B," p. 22. (Emphasis added.)

The Court of Appeals held,

"As to appellant's companion contention, *the court was well warranted in finding that there was no prejudice or bias in fact manifested in the course of the proceedings. Indeed, there was considerable evidence which negatived it.*" Pet. for Cert., Appendix "A," p. 19. (Emphasis added.)

Petitioner cites and quotes from several state and federal court decisions apparently to support its argument that an important question of federal law is involved and that the rule proposed by Petitioner is substantiated by case authority. Pet. for Cert., p. 9-12. It is respectfully submitted that the cases and the quotations from the cases entirely fail to indicate that there is an important question of federal law in the case at bar which should be resolved by this Court; furthermore, the cases and quotations noted by Petitioner are not necessarily inconsistent with and in fact tend to support the position of Respondent to the effect that the courts follow the procedure of weighing the evidence to determine whether the objecting party to an arbitration award has received an actually fair and impartial hearing, and, if previous business relationships are charged, whether those relationships are so close as to cause the fairness of the hearings to be suspect. See, e.g. *Stef Shipping, supra,* cited by Petitioner at p. 9, Pet. for Cert.

The *Ilios Shipping* decision, *supra,* relied on by the District Court and the Court of Appeals contains perhaps the best statement of the repudiation of the proposition made by Petitioner that a finding of business rela-

tionship between an arbitrator and a party inherently necessitates setting aside the award. The court held,

> "Something more than a vague and rather remote business relationship between the arbitrator and one of the parties to the arbitration is certainly needed if the losing party seeks to vacate the award on the ground of 'evident partiality' of one of the arbitrators. *It is well established that the mere fact that there is some business relationship between the arbitrator and one of the parties to the arbitration is not in and of itself sufficient to disqualify the arbitrator.* [*Citing E. Richard Meinig Co., supra.*]" 148 F.Supp. 698, 700. (Emphasis added.)

Petitioner attempts to distinguish *Ilios Shipping* from the case at bar by saying that, " . . . one of the grounds for denying the motion to set aside the award was *the knowledge by the adverse party of the prior relationship.*" Pet. for Cert., p. 15. Contrary to this statement of the case, the objecting party had no knowledge of the business relationship between the other party and the arbitrator, but only had knowledge of the fact the arbitrator was in a particular business (*Ilios Shipping*, 148 F.Supp. 698, 700), the same knowledge Petitioner had in the case at bar (R.137a). Knowing such business, and the likelihood that there could have been transactions between the arbitrator and the other party in the normal course of such business, the objecting party was held bound by what he could have learned upon inquiring of the persons involved; likewise, in the case at bar Petitioner, having had knowledge of the occupation and professional reputation of Mr. Capacete, cannot now be heard to complain of what it could easily have discovered prior to arbitration.

II. THERE IS NO CONFLICT BETWEEN THE DECISIONS OF THE COURTS OF APPEALS

Petitioner claims there is a conflict between the decisions of the Courts of Appeals which should be resolved by the Supreme Court. Petitioner argues that the decision of the Second Circuit in *Ilios Shipping, supra,* and the decision of the First Circuit in the case at bar conflict with the decisions of the Third Circuit in *Rogers v. Schering Corporation,* 165 F.Supp. 295 (D.C.N.J. 1958), aff'd 271 F.2d 266 (1959), and of the Ninth Circuit in *American Guaranty Co. v. Caldwell,* 72 F.2d 209 (1934).

Petitioner apparently contends that the *Rogers* and *American Guaranty* cases hold that where a claim of partiality is made based on business relationship of an arbitrator with one of the parties and this relationship has not been disclosed, the award is automatically set aside on the ground of "evident partiality" without any other consideration entering into this determination. In short, Petitioner argues that these cases establish an absolute rule requiring disclosure of business relationships, however remote and insignificant they may be, which, if not complied with by a party, will result in an automatic vacatur of an arbitration award under the Federal Arbitration Act. These cases simply do not support this proposition.

The *Rogers* case concerned an arbitration clause in a written contract which specifically required that the parties submit disputes to arbitration pursuant to the rules of the American Arbitration Association and to select arbitrators from panels furnished by the American Arbitration Association. The court, after elaborate discussion of the Arbitration Association's rules, held that Section 18 of the Arbitration Association's rules re-

quired disclosure to the parties of "any circumstances likely to create a presumption of bias or which he [the arbitrator] believes might disqualify him as an impartial arbitrator." 165 F.Supp. 295, 298. Since, in violation of Section 18, information of this sort had not been forwarded the objecting party by the Arbitration Association which had received such information from the arbitrator, the court vacated the award.

The turning point of the case in *Rogers* was that the parties had *contracted* for disclosure to be made by the parties by incorporating the American Arbitration Association rules. The failure of the Arbitration Association to comply with its own rules resulted in what the court termed a failure of "due arbitration process." 165 F.Supp. 205, 301. *Rogers* is, therefore, in the class of those decisions where courts have set aside awards because an arbitrator has been appointed in a manner not in full compliance with the procedure specifically required by the arbitration clause of the contractual agreement, and is not a case which holds that, absent contractual agreement to disclose such information, there is an absolute duty under the Federal Arbitration Act to volunteer unsolicited information about previous business relations, however insignificant and remote, under penalty of vacatur of the award.

In the case at bar there was no such contractual agreement between the parties to follow the rules of the American Arbitration Association or to incorporate by contract any other requirement for the volunteering of unsolicited information by arbitrators or parties. Accordingly, since there was no agreement between the parties to deviate from the general rules obtaining for the selection of arbitrators and the conduct of proceedings, the

general rule that the mere fact that prior business relations existed is not sufficient alone to vacate the award remains controlling of the case; if such information is desired by a party to arbitration proceedings, the duty is simply to inquire of the arbitrator or the other party whether such business relations have existed.

The *American Guaranty* case, *supra*, briefly referred to by Petitioner similarly fails to support the proposition made by Petitioner. The objecting party challenged the arbitration award in the trial court on *two* grounds, that one of the arbitrators was "irregularly appointed" and that the same arbitrator had a "business connection" with the other party. *Id.* at 211. The trial court, after reviewing the evidence presented, had held that the arbitrator was "improperly appointed" and "that his actions as umpire were partial to appellant." *Ibid.* The Court of Appeals held,

> "The holding of the District Court that the appointment of R. E. Laley as arbitrator was irregular and illegal and that the award of said arbitrator was evidently partial, but not corrupt or fraudulent, was fully justified. The method of appointment as provided in the agreement was not followed, and the arbitrator appointed had a business relationship with one of the parties. These facts, *taken together*, warranted the setting aside of an award made by such an arbitrator as inherently partial, even though not corrupt or fraudulent. [Authorities cited.]" *Id.* at 212. (Emphasis added.)

It is clear that this holding rests on *two* grounds, namely, that the appointment was irregular, i.e., not in accordance with the procedure prescribed by the contract between the parties, and secondly, that the arbitra-

tor was "evidently partial." It appears from the description of the trial court's decision, "that his [the arbitrator's] actions as umpire were partial to appellant," that there was evident partiality in the "actions" of this arbitrator, but that the Court of Appeals could not go so far as to say that this actual partiality amounted to "corrupt or fraudulent" conduct, more extreme degrees of misconduct. It is self-evident that the Ninth Circuit of Appeals did not say, much less hold, that an undisclosed prior business relationship, regardless of the circumstances, was sufficient alone to set aside the award automatically.

A discussion of these cases indeed shows that the courts are in agreement that their function in reviewing arbitration awards is to study the merits of the objections made and determine whether under the Federal Arbitration Act the objecting party was denied any rights, including such rights as the right to compliance with the contract arbitration procedure and the right to a fair and impartial hearing. In the case at bar there has been no contention that the arbitration procedure specified by the contract has not been followed and, as noted above, it has generally been conceded by Petitioner that the hearings were fair and impartial; additionally, as discussed above (*infra* at p. 16-17), both the trial court and the Court of Appeals found specifically that the hearings were fair and impartial.

To follow the rule proposed by Petitioner would completely frustrate and perhaps forever destroy the principal values of arbitration proceedings. The advantages of arbitration as compared with litigation are the relative speed and inexpensiveness with which disputes between parties can be settled by arbitration; experts in the field in which the dispute arises are frequently used

rather than attorneys or professional arbitrators; the proceedings are often conducted by the parties themselves without employment of attorneys. Note, Judicial Review of Arbitration Awards on the Merits, 63 Harv.L. Rev. 681 (1950). To impose legalistic, technical and unnecessary procedural pitfalls on this means of contractual settlement of disputes would open many additional doors to the challenge of arbitration awards and eliminate the confidence of the parties in the finality of awards. In turn, of course, such requirements would promote litigation over technical matters by losing parties attempting in any way possible to set aside awards. Clearly, this result violates the policy adopted by Congress in the Federal Arbitration Act supporting resolution of disputes by arbitration.

The Supreme Court has had occasion to comment on the Federal Arbitration Act and its purposes in *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.ed. 168 (1953),

> "The United States Arbitration Act establishes by statute the desirability of arbitration as an alternative to the complications of litigation. The reports of both Houses on that Act stress the need for avoiding the delay and expense of litigation [authorities cited], and practice under its terms raises hope for its usefulness both in controversies based on statutes [authorities cited] or on standards otherwise created [authorities cited]." 364 U.S. 427, 431-432, 98 L.ed. 168, 173-174.

The Court goes on to point out that arbitration is less formal than judicial proceedings and that, "Power to vacate an award is limited [citing 9 U.S.C.A. § 10]" (346 U.S. 427, 435-438, 98 L.ed. 168, 176-177); these, of course, are characteristics of arbitration which are neces-

sitated in order to achieve less delay and expense than are found in judicial proceedings.

It is noteworthy to observe that the history of the case at bar which began in early 1963 reflects the time-consuming efforts of the parties, their counsel and the attendant expenses incurred attempting to obtain a final resolution of disputes between the parties which should have been concluded by the award rendered in the fall of 1963. As the District Court observed,

> ". . . plaintiff's [Petitioner's] objections represent a 'situation where the losing party to an arbitration is now clutching at straws in an attempt to avoid the results of the arbitration to which it became a party.' [Quoting from *Ilios Shipping, supra,* 148 F.Supp. 698, 700]" (R.176a-177a). Pet. for Cert., Appendix "B," p. 22.

CONCLUSION

Respondents respectfully submit that Petitioner has not met the test for the granting of a writ of certiorari in that there are manifestly no "special and important reasons" present for the granting of certiorari. Rule 19, Rules of the Supreme Court of the United States. As the Supreme Court stated in *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 43 S.Ct. 422, 67 L.ed. 712 (1923),

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority be-

tween the circuit courts of appeal." 261 U.S. 387, 393, 67 L.ed. 712, 714.

Petitioner has failed to show any reason warranting the granting of certiorari and, moreover, the relevant authorities reflect that the issue raised in the case at bar by Petitioner is being adequately and uniformly resolved by the Courts of Appeals, including the Court of Appeals for the First Circuit in the case at bar. Accordingly, the Petition fo Certiorari should be denied.

Respectfully submitted this 19th day of January, 1968.

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